PP

v.

SUKUMARAN SUDRAM

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CRIMINAL CASE NO: 45-22-98]
18 SEPTEMBER 1999
[1999] CLJ JT(7)

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in heroin - Ingredients - Whether proved - Drugs concealed in bathroom of condominium - Accused a tenant of condominium - Whether "prima facie" case proved - Statutory presumptions of trafficking - Whether accused sole occupier of condominium - Whether in possession, custody and control of drugs - Dangerous Drugs Act 1952 (Revised 1980), ss. 37(b), 37(da), 37(g), 39B(1)(a), 39B(2) - Criminal Procedure Code, s. 180(i)*

CRIMINAL PROCEDURE: *Prosecution - End of prosecution case - Standard of proof - Prima facie case - Post Criminal Procedure Code (Amendment) Act 1997 - Meaning, scope and concept of "prima facie case" - Duty of prosecution - Whether to establish only "prima facie evidence" - Whether to prove "a case which if unrebutted would warrant a conviction" - Criminal Procedure Code, s. 180(i)*

WORDS & PHRASES: *"Prima facie case" - Criminal Procedure Code, s. 180(i)*

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) ('the DDA') for trafficking in 54.2 grams of heroin ('the drugs'). In the court, evidence was led by the prosecution *inter alia* that: (i) on 3 January 1998, the accused was arrested by the police at the car park of the Federal Cinema, Jalan Jelutong, Georgetown, but nothing incriminating was found on him; (ii) the accused subsequently led the police party to his rented 3-room condominium, and after a forced entry thereinto, the police discovered the drugs which was concealed in the ceiling of the bathroom; (iii) from the rooms of the condominium, including a locked room, male and female clothings were found by the police; and (iv) a police party revisited the condominium the next day, and entered the same by using keys taken from the security office. Before the learned judge, the primary issue that arose was whether on the facts, and upon the proper meaning of *"prima facie"* in s. 180(i) Criminal Procedure Code ('Code'), a *prima facie* case of trafficking under the DDA had been made out against the accused.

Held:

[1] By virtue of the Criminal Procedure Code (Amendment) Act 1997 ('Act A979'), at the close of the prosecution case, the court "shall consider whether the prosecution has made out a *prima facie* case against the accused". *"Prima facie"* however has not been defined by the Code or Act A979.

[2] The expression *"prima facie case"* can no longer be used for brevity to denote "a case that has been made out which, if unrebutted, would warrant his conviction", as such phrase is nowhere to be found in the post Act A979. Post Act A979, all judicial enunciations and definitions of *"prima facie case"* basing on the interpretation of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction" ought to be jettisoned. Also, post Act A979, the *"prima facie case"* prescribed in the Code must be resolved from a fresh perspective, with fresh eyes, and without reference to the now absent words "no case against the accused has been made out which, if unrebutted, would warrant his conviction".

[3] The Court of Appeal in *Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin* in adopting *Khoo Hi Chiang* and *Arulpragasan's* enunciation of a *"prima facie case"* in the context of the repealed s. 180 of the Code, had apparently forgotten, with respect: (i) that the language of r. 74 of the Armed Forces (Court Martial) Rules of Procedure 1976 ('the Rules') is differently worded from the Code; (ii) that the *"prima facie case"* in both *Khoo Hi Chiang* and *Arulpragasan* was enunciated in the context of a differently worded Code; and (iii) that the *"prima facie case"* prescribed in the Rules would not be "a case which if unrebutted would warrant his conviction" as the statutory formula – "no case against the accused which, if unrebutted, would warrant his conviction"– is nowhere to be found in the Rules.

[3a] In the absence of a similar and comparable statutory formula in the Rules, the grounds and arguments advanced in *Khoo Hi Chiang, Arulpragasan* and other authorities could not have been adopted in *Lt Kol Yusof*. It was thus unfortunate that the Court of Appeal therein had proclaimed, notwithstanding the plain and natural meaning of the words *"prima facie"*, that "nobody would dare suggest as a matter of prudence that the degree of proof at this stage [close of prosecution case] is not proof beyond reasonable doubt".

[4] The standard of proof of a *prima facie case* is *prima facie evidence* and not conclusive or beyond reasonable doubt evidence. Hence, a *prima facie case* is made out where there is sufficient credible *prima facie evidence* establishing each essential ingredient of the offence for a supposition of guilt if it is not answered by the accused. Post Act A979, that is all that is needed for the defence to be called.

[5] There is no direct evidence of drug trafficking activity in the present case. The prosecution, nonetheless, is entitled to rely on statutory presumptions towards proof of drug trafficking or other ingredients of the offence. But yet, to invoke statutory presumptions, there must be *prima facie evidence* of the basic or primary facts. There must be evidence that the accused was in possession of at least 15 grams of heroin and that he had the care and management of the condominium.

[6] It must appear, from the unchallenged facts, that the accused had the care and management of the condominium at the material time. That being so, the accused "shall be deemed" to be the occupier thereof pursuant to s. 37(b) DDA. And since the drugs were found concealed in the condominium, it "shall be presumed", pursuant to s. 37(g) DDA, that the drugs were so concealed with the knowledge of the accused.

[6a] Knowledge alone, however, is not enough to establish possession. There must also be evidence that the accused had some degree of control, or care or guardianship of the drugs. This must be so as the accused was not in physical control of the drugs.

[7] There is no evidence that the accused, *albeit* the tenant, had exclusive physical control of the condominium. The evidence showed that the condominium had three sets of keys, two of which were kept by PW6 whilst the accused had one. But there could also have been one other set of keys, at the very least, as the prosecution had also led evidence that the keys that PW5 used to open the condominium on 4 January 1998 were not obtained from the accused, but from the security post. Clearly, the security post had keys to the condominium, and if that be so, they must have access to the condominium.

[8] The narrative, as adduced by the prosecution, did not settle the questions of whether the accused was the sole occupier of the condominium or whether there were other occupiers, and likewise, the questions of whether the security post had the keys of the accused to the condominium or whether a new lock was installed after 7am on 3 January 1998.

[8a] There is no settled narrative and consequently there is no *prima facie case*. There is just no sufficient credible evidence upon which the court can proceed to find the accused guilty even if he should remain silent. The only evidence of control, of care, or of guardianship of the drugs concealed in the condominium is by inference of the tenancy of the accused. In a capital offence, evidence by inference alone, without the element of control, is not enough to support a conviction.

[Accused acquitted and discharged without defence being called.]

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Badrulsham Baharom [1988] 2 MLJ 585 ***(refd)***
Chan Chin Min & Anor v. Lim Yok Eng [1994] 3 CLJ 687 ***(refd)***
Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***
Choo Chang Teik v. PP [1991] 3 CLJ 2387 ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791 ***(refd)***
Creswell v. BOC Ltd [1980] 3 All ER 443 ***(refd)***
Director of Prosecutions v. Brooks [1974] AC 862
Gooi Loo Seng v. PP [1993] 3 CLJ 1 ***(refd)***
Ho Seng Seng v. Rex [1951] MLJ 225 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Leow Nghee Lim v. Reg [1956] MLJ 28 ***(refd)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin [1997] 2 CLJ 752 ***(cit)***
Magor & St Mellons RDC v. Newport Corp [1952] AC 189 ***(refd)***
Maunsell v. Olins [1975] AC 373 ***(refd)***
Neo Koon Cheo v. Reg [1959] MLJ 47 ***(refd)***
PP v. Ang Boo Foo [1981] 1 MLJ 40 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(refd)***
PP v. Ha Jong Ru [1980] 2 MLJ 256 ***(refd)***
PP v. Kau Joo Huat [1988] 2 MLJ 91 ***(refd)***
PP v. Runjit Singh [1999] 3 CLJ 301 ***(refd)***
R v. Ashwell [1885] 16 QBD 190 ***(refd)***
Re An Advocate [1964] 30 MLJ 1 ***(refd)***
Sunprinting & Publishing Association v. Remington Paper & Power Co Inc [1923] 130 NE 470 ***(refd)***
Tan Ah Ting v. PP [1974] 2 MLJ 37 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
Toh Ah Lok & Mak Tin v. Rex [1949] MLJ 54 ***(refd)***
West Coast Hotel Co v. Parish [1937] 300 US 379 ***(refd)***

Legislation refered to:
Armed Forces (Court Martial) Rules of Procedure 1976, r. 74
Criminal Procedure Code, s. 173(f) (repealed)
Criminal Procedure Code (Amendment) Act 1997, ss. 180(i), (ii), (iii)
Dangerous Drugs Act 1952, s. 37(b), (da), (g), 39B(1)(a), 39B(2)

Other source(s) referred to:
Cross, Statutory Interpretation, 1987, p 47
Halsbury's Laws of England, 4th edn, vol 17, paras 23, 28
Wharton's Law Lexicon, Reprint 1997, 14th edn

For the PP - Ahmad Zakhi Mohd Daud
For the accused - K Kumaraendran; M/s Kumar & Co

Reported by WA Sharif

JUDGMENT

Jeffrey Tan J:

The charge against the accused reads as follows:

> Bahawa kamu 3 Januari 1998, jam lebih kurang 2.45 pagi, di rumah Blok B-12-4 'U' Garden, Sungai Nibong, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu heroin seberat 54.2 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum dibawah Seksyen 39B(2) Akta Dadah Berbahaya.

The evidence adduced by the prosecution may be summarised as follows. At about 1.45am, on 3 January 1998, at the car park of the Federal Cinema, Jalan Jelutong, Georgetown, a police party led by Inspector Chang Kut Choy (PW4) arrested the accused and one Gunalan a/l D Rajamanikam (Gunalan), both whom the police party suspected to be drug addicts, and brought them to the Police Contingent Headquarters, Jalan Penang, Georgetown. At the Standby Office, Police Contingent Headquarters, PW4 questioned the accused, whilst another police officer (Inspector Sundram) questioned Gunalan. Thereafter, PW4 together with other officers took the accused to a condominium - Blok B-12-4 'U' Garden, Sungai Nibong (condominium). They (police party and accused) reached the condominium at about 2.45am. PW4 kicked open the front door. The accused was taken into the condominium. PW4 went to the bathroom. PW4 instructed Inspector Anderson to pry open the asbestos ceiling. From the ground, PW4 saw a part of a white paper package. Inspector Anderson retrieved that white paper package and handed it to PW4. In the presence of the accused, PW4 opened that white paper package. In it was a powdery substance. PW4 climbed up the ceiling and conducted a further search. Nothing else was found. The police party then searched the rooms (3) in the condominium. Male clothing was found in the room shown in photograph P7(23). The room shown in photographs P7 (24) was locked; PW4 kicked open the door; lying on the bed, were furniture purchase receipts. PW4 took possession of those receipts, the clothing shown in photograph P7(24) and the white paper package. Later, at the Police Contingent Headquarters,

PW4 lodged a police reports (ED12 and ED14), prepared a search list (P20), served the search list on the accused, marked the exhibits he had recovered from the condominium, and handed the accused and exhibits recovered from the condominium to Inspector Selvarajah a/l Raman (PW5).

At 12.15pm, on 4 January 1999, PW5 went to the condominium with the accused, Inspector Sam Phan and Corporal Zunaidi. The front door was locked. With keys (P7(29)) from the security office, PW5 opened the front door of the condominium. Inside, PW5 recovered a bill (P19F), and 9 pieces of clothing and 2 towels (P22(1 - 11)) from the rooms shown in photographs P7(23) and P7(24). On 11 January 1998, PW5 searched the flat of the mother of the accused – F16-12, Padang Tembak – but found nothing incriminating. On 1 March 1998, PW5 handed the things in the condominium (all particularised in search list – D26) to Norris Nayagam, the uncle of the accused. Of those items returned to Norris Nayagam, PW5 testified that the jackets and 4 T-shirts were recovered from the room shown in photograph P7(24).

According to Chee Kok Leong (PW6), the owner of the condominium, he had three sets of keys to the condominium. He handed one set to Cheah Yew Hock (PW7), his cousin who was managing the condominium for him. Before the condominium was let out, he handed one set to the developer to attend to a building defect – the ceiling was leaking. That set was returned to him. He had not given a set of keys to the management of 'U' Gardens. The keys shown in photograph P7(29) was that set of keys he gave his cousin (PW7) to be handed to the tenant.

Cheah Yew Hock (PW7) testified that he let out the condominium to the accused. The condominium was handed to the accused sometime in 1997. The accused paid the rent to him. He handed a set of keys to the accused. He had rented out his own condominium – 3, Blok A Tingkat 11, "U' Garden – to the accused. That was how he got to know the accused. He would not know if the accused rented the condominium with others. The condominium, before it was let out to the accused, had not been let out before.

Mohd Ali bin Md. Kechik (PW8), a security personnel of "U' Garden, testified that he was instructed, at 7am on 3 January 1998, to guard the condominium. He met PW7. The lock of the condominium was broken (pecah). A new lock was installed. PW7 handed him a set of keys to the new lock.

Lee Chen Chen (PW9), who was working then for the management of 'U' Garden, testified that there were records of the tenants of 'U' Gardens, but she had forgotten who was the tenant of the said condominium.

Gunalan a/l Rajamanikam (PW10), who was arrested together with the accused, testified that he was a friend of the accused but had not been to the condominium before. Under cross-examination, PW10 said that he was recently arrested but not charged yet for a drug related offence.

Norris a/l Nayagam (PW11), the uncle of the accused, testified that PW5 handed him a bundle of clothing on 1 March 1998. In that bundle, were four T-shirts, a jacket, seven towels and female apparel (bras, panties, stockings and a long dress). He asked the members of his family to whom they belonged. No one knew. So, he threw them all away.

Chee Siang Koon (PW12), the Manager then of the Federal Cinema, testified that keys was not found in the cinema hall on 3 January 1998.

And at the beginning of the case for the prosecution, Elliza bte Mat Nor (PW1), a government chemist, testified that she analysed the powdery substance in the white paper package and that she found it to contain 54.2 grams of heroin.

Mr Kumareandran for the accused commenced his submission at the close of the case for the prosecution, and appropriately so in view of the recent amendment to the Code, by asking the following question, "what is the standard of proof at the close of the prosecution case?"

Under the present provisions of the Criminal Procedure Code, as amended by the Criminal Procedure Code (Amendment) Act 1997 (Act A979), with regard to a trial before the High Court of an alleged offence committed on or after 31 January 1997, "when the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused" (s. 180(i) of the Code). "If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal" (s. 180(ii) of the Code). "If the Court finds that a *prima facie* case has made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence" (s. 180(iii) of the Code).

The concept of "*prima faci*e case" has long been used in courts, "in two senses":

> (i) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favour of allegations he asserts; this means plaintiff's evidence is sufficient to allow his case to go to jury, and
>
> (ii) Courts use *'prima facie'* to mean not only that the plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it"
>
> (*Black's Law Dictionary* 6th edn).

Or put differently, a *"prima facie case"* has been defined as:

(i) the establishment of a legally required presumption that may be rebutted; or

(ii) the plaintiff's burden of producing enough evidence to permit the fact-trier to infer the fact at issue

(*A Dictionary of Modern Legal Usage* 2nd edn by Bryan A. Garner).

Locally, the expression *"prima facie case"* has also long been used in the courts, "often for brevity and convenience to denote a case to answer ...." (*Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1 per Edgar Joseph Jr. FCJ). "Instead of the words 'no case against the accused has been made out which, if unrebutted, would warrant his conviction' used in (the repealed ss. 173(f) and 180 of the Code), it is common ... to use the words 'no case has been made out against the accused' or 'no *prima facie* case has been made out against the accused'" (*Tan Ah Ting v. PP* [1974] 2 MLJ 37 per Wan Suleiman FJ).

Of course, because of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction" in the repealed ss. 173(f) and 180 of the Code, what constituted or made up a *"prima facie case"*, as opposed to the mere expression "*prima facie case*", had been enunciated and pronounced, prior to Act A979, by interpretation of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction" used in the repealed ss. 173(f) and 180 of the Code. Indeed, the landmark case of *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] 1 MLJ 265 revolved almost essentially, and rightly so, on the interpretation of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction" in the repealed ss. 173(f) and 180 of the Code.

Unfortunately, not all authorities approached the concept of *"prima facie case"* by interpretation of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction", the very prerequisite to call or not to call an accused to enter upon his defence. They adopted textbook and or judicial definitions seemingly without regard for the statutory formula in the repealed ss. 173(f) and 180 of the Code. Nevertheless, be it by interpretation of the repealed ss. 173(f) & 180 and or adoption of definitions, the concept of *"prima facie case"* had been enunciated as follows:

(i) A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side (*PP v. Chin Yoke* [1940] MLJ Rep 37,38 – adopting the definition given in *Mozley and Whiteley's Law Dictionary* 5th edn),

(ii) Section 173 of the Criminal Procedure Code lays down the procedure to be followed by Magistrates in summary trials. The 'evidence hereinbefore referred to' in paragraph (f) of that section has reference only to the evidence given for the prosecution. That being so, it is the duty of a Magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt (*Soo Sing & Ors v. PP* [1951] MLJ 143)

(iii) ... I am left with the conclusion that the position is still as explained by Whiteley Ag. CJ in *PP v. Lee Pak* [1937] MLJ 265, 267, when he said in terms which I, with respect, adopt for the purposes of this case and which I regard as almost classical:-

> Magistrates should bear in mind that in order to entitle them to call upon the defence it is not necessary that the prosecution should have made out an unanswerable case. It is sufficient if they have made out a *prima facie* case which calls for an answer, and which it is necessary for the accused to rebut.

To put it shortly, whether in considering an application of no case or in reviewing the whole case at the end of the trial the Magistrate simply has to make up his mind whether he is satisfied that the prosecution has made out its case. He is not allowed to guess.

... I see no difference between establishing a case beyond reasonable doubt and establishing a *prima facie* case; the terms are synonymous, only context is different. The former expression is normally used at the end of the whole case, whereas the latter at the conclusion of the prosecution case, implying simply that there may be more evidence to come. Otherwise the tests are the same and simply embody the statutory definition of 'proved' in section 3 of the Evidence Act (*Lim Kheng Kooi & Anor v. Reg* [1957] 23 MLJ 199, 204).

(iv) In a summary trial if the court is satisfied that, if unrebutted, the evidence adduced at the close of the prosecution case would warrant the accused's conviction, then a *prima facie* case is said to have been made out. In such a case the accused should be called upon to state his defence. If however, after weighing all the evidence adduced at the close of the prosecution case the court is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then it is said that no *prima facie* case has been made out against the accused and the accused should not be called upon to enter his defence. (*Zahari bin Yeop Baai & Anor v. PP* [1980] 1 MLJ 160),

(v) the crucial words in [ss. 173(f) & 180] are the words 'if unrebutted', which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by [ss. 173(f) & 180] the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses (*Haw Tua Tau v. PP* [1981] CLJ 123; [1981] 2 MLJ 49, 51).

(vi) ... the learned Magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable that its existence to be reasonably inferred. (*A. Ragunathan v. PP* [1982] 1 CLJ 25; [1982] 1 MLJ 139, 141),

(vii) At the close of the prosecution case the test of a *prima facie* case is not 'Has the prosecution evidence established the case against the accused beyond a reasonable doubt?' but rather 'If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?'. (*PP v. Abdullah bin Ismail* [1983] 1 MLJ 417).

(viii) Now the sole question at the close of the case for the prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged (*Pavone v. PP* [1984] 1 MLJ 77, 79),

(ix) Thus, under s. 180, the judge must ask himself on the basis of credible evidence, a mere hypothetical question: 'If I were to accept the prosecution's evidence as accurate, would it establish the case against the accused beyond a reasonable doubt?'. Putting it in the *prima facie* case form: 'On the assumption that the prosecution's evidence was accurate, could the accused be lawfully convicted?'. (*Munusamy v. PP* [1987] 1 MLJ 492, 497),

(x) Having heard all the evidence by the prosecution as contained in the brief facts of the case, an accused is entitled to an acquittal if upon such hearing the court finds that no case has been made out which if unrebutted would warrant his conviction. This is what is commonly known as *prima facie* case being made out. By *prima facie* evidence it means that at the end of the prosecution case there must be found some evidence (not inherently incredible) which, if the court were to accept as accurate, would establish each essential element in the alleged offence. If such evidence as respect any of those essential elements is lacking, then no case against the accused has been made out which if unrebutted would warrant his conviction within the meaning of s. 173(f) of the CPC (*PP v. Ng Kong Kia & 4 Ors* [1993] 2 AMR 29:1278, 1281),

(xi) ... the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible – the *Haw Tua Tau* test – but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt (*Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] 1 MLJ 265, 290).

(xii) Clearly, therefore, *Khoo Hi Chiang* decided, after full argument on the point, and after much thought and dialectic to discussing a controversial problem of law, that the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia is, having regard to the relevant statutory formula, the usual standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution, that is to say, 'a more rigorous test of credibility' was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* standard of proof of a mere *prima facie* case which called for a minimum evaluation of the evidence tendered by the prosecution, thereby overruling *Haw Tua Tau*, on that point (*Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1, 57).

In *Arulpragasan a/l Sandaraju v. PP (supra)* @ 40, Edgar Joseph Jr. FCJ perceptively observed that "the expression 'a *prima facie* case' is nowhere to be found in the (pre-Act A979) Code." But now, the tables have turned, for the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction", are nowhere to be found in the post Act A979 Code. Now, at the close of the prosecution case, the court "shall consider whether the prosecution has made out a *prima facie* case against the accused". But what is that "prima facie case" that the legislature has not defined in the Code.

In the interpretation of any written law, the first canon of construction – the literal rule – is to give the "ordinary, plain and natural meaning" of the words contained in a statute (see *Creswell v. B.O.C. Ltd.* [1980] 3 All ER 443). "Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rule of grammar" (*Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69). There will only be a departure from the literal rule where "the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute" (*Cross, Statutory Interpretation* [1987] p. 47) or "would produce a result repugnant to the other provisions of the Ordinance and defeat their purpose, including one of the principal purposes of the Ordinance" (*Re An Advocate* [1964] 30 MLJ 1). Words would then be read in any secondary meaning which they are capable of bearing, "so as to obviate the injustice, absurdity, anomaly or contradiction or fulfill the purpose of the statute" (*Maunsell v. Olins* [1975] AC 373, 391), with the help, if need be, of the aids to construction and presumptions in the law of statutory interpretation.

As said, the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction", are now nowhere to be found in the Code (post Act A979). Accordingly, the expression *"prima facie case"* can no longer be used for brevity to denote "a case against the accused that has been made out which, if unrebutted, would warrant his conviction". The concept of *"prima facie case"* can no longer be elicited from the former statutory formula – "no case against the accused has been made out which, if unrebutted, would warrant his conviction". Post Act A979, all judicial enunciations and definitions of *"prima facie case"*, basing on the interpretation of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction", must be jettisoned. Post Act A979, the *"prima facie case"* prescribed in the Code must be resolved from a fresh perspective, with fresh eyes, and without reference to the now absent words "no case against the accused has been made out which, if unrebutted, would warrant his conviction".

There are no pointers in the Code as to what is a *"prima facie case"* or what constitutes a *"prima facie case"*. Still, the *"prima facie case"* prescribed in the Code plainly brings up the concept of *"prima facie case"*.

Apart from what has already been quoted on the subject, *Halsbury's Laws of England* 4th edn, vol 17, paras 23, 28 explains the concept of "*prima facie* case to answer" and "*prima facie* evidence" as follows:

> Before the evidence is left to the jury, the judge has to decide whether there is sufficient evidence to establish a *prima facie* case. He must consider whether there is evidence upon which a jury can proceed to find a verdict for the party producing it, upon whom the onus of proof rests. If there is no evidence either the case will be withdrawn or the jury will be directed to find in favour of the other party. Similarly it is for the judge to determine whether it is open to the jury to draw an inference from the facts proved, leaving it to the jury to say whether or not it does. If there is a conflict of evidence, it is for the jury's province to decide which evidence it prefers to accept.
>
> *Prima facie* evidence means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention. Sufficient evidence usually means no more than *prima facie* evidence, but the matter is always one of interpretation of the particular statute of document. Conclusive evidence means that no contrary evidence will be effective to displace it, unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown. Conclusive evidence does not mean exclusive evidence.

The expression *"prima facie case"* has also been correlated with the expression *prima facie* evidence. In *Tan Ah Ting v. PP (supra)* at 38, Wan Suleiman FCJ said:

> The term '*prima facie* case' or '*prima facie* evidence' has suffered from lack of uniformity in usage (see *Cross on Evidence*, 2nd Edition, pages 24, 25):
>
> > *Prima facie* evidence: first sense ... where a party's evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so.
> >
> > *Prima facie* evidence: second sense (presumptive evidence) ... where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence.

Likewise correlating the expressions *"prima facie case"* and "*prima facie* evidence", in *PP v. Ha Jong Ru* [1980] 2 MLJ 256, 258, Tan Chiow Tong J said:

> The meaning of the expression *prima facie* case/evidence generally accepted by the courts is where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence.

Incidentally, both Wan Suleiman FCJ and Tan Chiow Tong J held that the second sense is the proper meaning to be accorded to the expression "*prima facie* case/evidence". And their Lordships' correlation of *"prima facie case"* with "*prima facie* evidence" was not inappropriate, as definitions of "*prima facie* evidence" are divining rods, since *"prima facie"* functions as an adjective in both cases, for an understanding of the concept of *"prima facie case"*.

Wharton's Law Lexicon 14th edn (Reprint 1997) defines "*prima facie* evidence" as:

> that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be credited by the jury, unless it be rebutted, or the contrary proved; conclusive evidence, on the other hand is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis that the one attempted to be established.

That "*prima facie* evidence" is not "conclusive evidence" can be learnt also from the following definitions of "*prima facie* evidence":

> Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defence, and which if not rebutted or contradicted will remain sufficient. Evidence which, if unexplained or uncontradicted is sufficient to sustain a judgment in favour of the issue which it supports, but which may be contradicted by other evidence.
>
> That quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the *prima facie* evidence with all of the other probative evidence presented. Evidence which standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof be obtained to or produced to overcome the inference.
>
> (*Black's Law Dictionary* 6th edn).

It all adds up, even if it could be argued at all that nothing much is definite or categorical in the definitions, that a "*prima facie case"* is not a "conclusive case" or a "beyond reasonable doubt case". As Edgar Joseph Jr FCJ drily remarked in *Arulpragasan a/l Sandaraju v. PP (supra)* @ , "it is wrong ... to equate a mere '*prima facie* case' with a 'beyond reasonable doubt case'". For there is a world of difference between a *"prima facie case"* and a "beyond reasonable doubt case", as His Lordship was at great pains to explain in his following statements:

> Take a case where the prosecution's evidence points to two likely inferences, one consistent with guilt, the other with innocence. In such a situation, if the standard of proof is that of a mere '*prima facie* case', in other words 'a *prima facie* supposition that the accused may be guilty' then the trial ought to proceed and the defence would have to be called (See *Karam Singh* [1967] 2 MLJ 25 (at p. 30, per Ong Hock Thye FJ).

If on the other hand, the standard of proof is 'beyond all reasonable doubt', then in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.

Another example which helps to further illustrate the point that there is a fundamental difference between applying a mere *'prima facie'* standard of proof and the 'beyond reasonable doubt' standard of proof, at the immediate stage of the trial, would be where, at the conclusion of the prosecution's case, there is strong prosecution evidence but there remains a reasonable tenable doubt. In such a situation, if the standard of proof is a mere '*prima facie* case', in other words a mere *prima facie* supposition that the accused may be guilty, then also the trial must proceed, and the defence would have to be called. On the other hand, if the standard of proof is 'beyond all reasonable doubt', then, in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.

Furthermore, if the onus on the prosecution at the close of its case, is to establish a 'mere *prima facie* case', the test to be applied is a minimal evaluation of the prosecution evidence to ensure that it is not inherently incredible (see *Haw Tua Tau v. PP*).

Indeed, it could not be argued at all, indeed how could it be, given the universally accepted meaning of the Latin words "*prima facie*", and the common law definitions on the concept of *"prima facie case"*, unless the plain and indisputable meaning of *"prima facie"* is to be ignored, that the *"prima facie case"* prescribed in the Code is a "beyond reasonable doubt case" or "conclusive case". A *"prima facie case"* is built on *prima facie* evidence. And since the standard of proof of a *prima facie* case is mere *prima facie* evidence, whereas the very purpose of a maximum evaluation of the prosecution evidence at the close of the case for the prosecution is to find a "beyond reasonable doubt case" at the close of the case for the prosecution, a maximum evaluation of the prosecution evidence at the stage of the close of the case for the prosecution is totally uncalled for. In fact, a maximum evaluation is anathema to the concept of a *prima facie* case.

Nonetheless, in *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1, 64, on the standard of proof at the close of the prosecution case, the court held, relying on *Lt Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md Amin* [1997] 2 CLJ 752; [1997] 1 MLJ 562, 577-578, that the "*prima facie* case as prescribed by the new s. 180(i) of the Criminal Procedure Code must mean a case which if unrebutted, would warrant his conviction". What is a "case which if unrebutted, would warrant his conviction" was not spelt out by the court. But earlier at p. 63, the court observed:

> What emerges from this illuminating judgment *(Lt Kol Yusof)* is clear. The meaning of a *'prima facie'* case in s. 180(i) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A *prima facie* evidence arises when the evidence is sufficiently strong for the opposing party to be called to answer .... a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence ... I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage.

In *Lt Kol Yusof*, the accused, an officer in the armed forces who was convicted of various corrupt offences by the court martial, had applied to the High Court for a writ of *certiorari*. In the appeal against the dismissal of the *certiorari* application, the Court of Appeal was called upon, on the question "whether – notwithstanding r. 74(1) which requires the prosecution to establish a *prima facie* case – the entire proceedings was a nullity because the tribunal applied the minimum evaluation test at the close of the prosecution case" (see p. 570), to interpret r. 74 of the Armed Forces (Court Martial) Rules of Procedure 1976 (Rules), which reads as follows.

> 74(1) At the close of the case for the prosecution the accused may submit to the court in respect of any charge that the prosecution has failed to establish a *prima facie* case for him to answer and that he should not be called upon to make his defence to that charge.
>
> 74(2) If the accused makes a submission under paragraph (1), the prosecutor may address the court in answer thereto and the accused may reply to the prosecutor's address.
>
> 74(3) The court shall then close to deliberate on whether a *prima facie* case has been made out against the accused.
>
> 74(4) The court shall re-open when it has arrived at a decision and –
>
> (a) if it has been decided that no *prima facie* case has been made out in respect of a charge, the president shall find the accused not guilty on that charge; or
>
> (b) If it has been decided that a *prima facie* case has been made out in respect of a charge, the president shall direct that the trial proceed on that charge.
>
> 74(5) The court shall not allow the submission unless it is satisfied that -
>
> (a) the prosecution has not established a *prima facie* case on the charge as laid; and
>
> (b) it is not open to them on the evidence adduced to make a finding under section 114 of the Act or paragraph (3) of Rule 81.

74(6) If the court allows the submission it shall find the accused not guilty of the charge to which it relates and announce this finding in open court forthwith; if the court disallows the submission it shall proceed with the trial of the offence as charged.

74(7) Irrespective of whether there has been a submission under this Rule or not, the court may at any time after the close of the hearing of the case for the prosecution, and after hearing the prosecutor, find the accused not guilty of a charge, and if it does so it shall also announce such finding in open court forthwith.

Sagaciously, the Court of Appeal observed that "the Rules are differently worded from the Code" (see p. 570), and that "r. 74 has elevated the expression 'a *prima facie* case' from a legal cliche to a statutory provision" (see p. 575). Then, perhaps, the Court of Appeal's understanding of the *"prima facie case"* prescribed in the Rules should throw some light on the *"prima facie case"* prescribed in the Code. Except, that the Court of Appeal in adopting *Khoo Hi Chiang* and *Arupragasan's* enunciation of a *"prima facie case"* in the context of the repealed s. 180 of the Code, had forgotten, with respect, (i) that the language of r. 74 is "differently worded from the Code", (ii) that the "*prima facie* case" in both *Khoo Hi Chiang* and *Arulpragasan* was enunciated in the context of a differently worded Code, and, (iii) that the *"prima facie case"* prescribed in the Rules would not be "a case if unrebutted would warrant his conviction", as the statutory formula – "no case against the accused has been made out which, if unrebutted, would warrant his conviction" – is nowhere to be found in the Rules. It was also forgotten, with respect, that the grounds and arguments advanced in *Khoo Hi Chiang*, *Arulpragasan* and other authorities for the finding that "a case which if unrebutted would warrant his conviction" is "a beyond reasonable doubt case" were anchored to the interpretation of a statutory formula – "a case which if unrebutted would warrant his conviction" – not to be found in the Rules. In the absence of a similar or comparable statutory formula in the Rules, the grounds and arguments advanced in *Khoo Hi Chiang*, *Arulpragasan* and other authorities could not have been adopted in *Lt Kol Yusof*. But it was, and in the unfortunate result, the Court of Appeal proclaimed, notwithstanding the plain and natural meaning of the words *"prima facie"*, that "nobody would dare suggest as a matter of prudence that the degree of proof at this stage (close of prosecution case) is not proof beyond all reasonable doubt".

Well, Abdul Hamid Embong J, in *PP v. Runjit Singh* [1999] 3 CLJ 301, where the accused was tried under the new s. 180 of the Code and where it was held that the prosecution had adduced "sufficient evidence" for the defence to be called, passed this comment, which this court subscribes, of *Lt Kol Yusof*:

Dengan hormatnya, saya fikir kes *Lt Kol Yusof* yang dirujuk oleh peguam OKT telah menyimpang daripada pendapat Mahkamah Persekutuan dalam kes *Arulpragasan* (on the difference between a *prima facie* case and a case beyond reasonable doubt) dan Mahkamah ini tidak perlu mematuhi keputusan Mahkamah Rayuan tersebut.

The Code requires the court, at the close of the case for the prosecution, to consider "whether the prosecution has made out a *prima facie* case against the accused". Imperatively, courts will enunciate, on the words "*prima facie case"* in the Code. And different courts may enunciate the words "*prima facie case"* in the Code quite differently. Yet effect must be given at all times to the plain and ordinary meaning of the words "*prima facie* case' in the Code. "... the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed (see *Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189 at 191). The Court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the court of law to give those words their natural meaning even though such interpretation leads to apparent anomalies" (*Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514 per Mohd Azmi FCJ). "... the duty of the court is simply to give effect to the will of Parliament as expressed in the law. 'The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation'. (See *West Coast Hotel Co. v. Parish*, 300 US 379 at 404 [1937] per Sutherland J) Similarly, Cardozo J said in *Sunprinting and Publishing Association v. Remington Paper and Power Co. Inc.* 130 NE 470, at 471 [1923]: 'We are not at liberty to revise while professing to construe'." (*Chan Chin Min & Anor v. Lim Yok Eng* [1994] 3 CLJ 687 per Edgar Joseph Jr FCJ). For it is the part of the court to enunciate, *judicis est jus dicere non jus dare,* and not to make law.

Now to answer the question put by Mr Kumareandran, the standard of proof of a *prima facie* case is *prima facie* evidence, and not conclusive or beyond reasonable doubt evidence. A *prima facie* case is made out where there is sufficient credible *prima facie* evidence establishing each essential ingredient of the offence for a supposition of guilt if it is not answered by the accused. Post Act A979 that is all that is needed for the defence to be called. To convict, however, is a different story altogether. The case must still be proved against the accused beyond all reasonable doubt.

There is no direct evidence of a drug trafficking activity. The prosecution is entitled, of course, to rely on statutory presumptions, towards proof of drug trafficking or other ingredients of the alleged offence. But yet, to invoke statutory presumptions, there must be *(prima facie)* evidence of the basic or primary facts (*Choo Yoke Choy v. PP* [1992] 4 CLJ 1791). It means, to invoke

the presumption of trafficking under s. 37(da) of the DDA 1952, that there must be evidence that the accused was in possession of at least 15 grams of heroin, and to invoke the presumptions under ss. 37(b) & 37(g) of the DDA 1952, that there must be evidence that the accused had the care and management of the condominium.

There is no statutory definition of "possession", a word variously said to be enigmatic and vague. However, judicial pronouncements on its meaning include invariably some degree of custody or control, and knowledge of the custody or control (see *Toh Ah Lok and Mak Tin v. Rex* [1949] MLJ 54; *Ho Seng Seng v. Rex* [1951] MLJ 225; *Leow Nghee Lim v. Reg* [1956] MLJ 28; *Director of Prosecutions v. Brooks* [1974] AC 862; *PP v. Lai Ah Bee (supra)*; *Badrulsham bin Baharom* [1988] 2 MLJ 585) but "a man has not possession of that of the existence of which he is unaware" (per Cave J in *R v. Ashwell* [1885] 16 QBD 190 at 201). Mere knowledge however is not sufficient to establish possession (see *Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] AMR 27-11335), but the power of disposal (see *PP v. Ang Boo Foo* [1981] 1 MLJ 40) is no longer an ingredient needed to support a conviction in a dangerous drugs trial (see *PP v. Kau Joo Huat* [1988] 2 MLJ 91).

In *Leow Nghee Lim,* Taylor J explained the meaning of custody "as having care or guardianship ... knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession", while Ambrose J in *Neo Koon Cheo v. Reg* [1959] MLJ 47 explained that "custody is actual physical control and control must be construed to mean any form of control other than actual physical control".

When he was arrested at the car park of the Federal Cinema, Jalan Jelutong, Georgetown, nothing incriminating was found on the accused. Rather, the drugs in question were found concealed in the ceiling of a condominium many miles removed from the accused. But that condominium was rented by the accused at the material time. So it must appear, reasonably from that unchallenged fact, that the accused had the care and or management of the condominium at the material time. Since it appears that the accused had the care and or management of the condominium, then the accused "shall be deemed" to be the occupier of the condominium (see s. 37(b) of the DDA 1952). And since the drugs were found concealed in the condominium, then it "shall be presumed" that the drugs were so concealed with the knowledge of the accused (see s. 37(g) of the DDA 1952), the (presumed) occupier of the condominium.

All the latter go undoubtedly towards proof of knowledge of the concealment of the drugs, of the presence, and of the whereabouts of the drugs. But knowledge alone is not enough to establish possession. In addition to knowledge, and this is because the accused was not in actual physical control of the drugs, there must be evidence that the accused had some degree of control, or some degree of care or guardianship, of the drugs.

But it could be argued, because the drugs were concealed in the condominium that the accused rented, that the accused must have had some degree of control of the drugs or had some degree of care or guardianship of the drugs. Otherwise, how else could those drugs have been concealed in the condominium, if not for the sanction of the accused? Except, that there is no evidence that the accused, albeit the tenant, had exclusive physical control of the condominium.

Going by the evidence, there should have been three sets of keys. PW6 kept two, whilst the accused had one. And since the condominium had not been let out before, there would not have been other sets of keys retained by former tenants. But yet, so it would appear, from the evidence, there could have been one other set of keys, at the very least. PW6 said that he had not handed a set of keys to 'U' Gardens. PW6 also said that the keys shown in photograph P7(29) was that set of keys that he gave PW7. In other words, those keys shown in photograph P7(29) were the keys handed to the accused. But those keys shown in photograph P7(29) were not obtained from the accused. They were obtained, on 4 January 1998, from the security post. But there is no evidence that the keys of the accused were ever handed to 'U' Garden. Then, could it not be that 'U' Garden had a set of keys. Anyhow, if the security post had keys to the condominium, then the security post had access to the condominium. But those keys shown in photograph P7(29) might not have been the keys handed to PW7 and then to the accused. PW8 testified that a new lock was installed, on 3 January 1998, and that PW7 handed a set of keys to the new lock to him. But if a new lock was installed, on 3 January 1998, then that set of keys that PW5 used to open the condominium on 4 January 1998 was not the set that PW7 gave the accused. But then, on whose evidence, PW6's or PW8's, should the court act on? Or should it not be, that the benefit of doubt be given to the accused, especially as PW7 had said nothing about a new lock, and especially as the narrative of the prosecution was uncertain as well? PW4 testified that the room shown in photograph P7(24) was empty, "seperti dalam P7(24)". But PW5 admitted, when he was cross-examined, that he recovered a jacket and 4 T-shirts from the room shown in photograph P7(24). PW5 testified that he took possession, on 4 January 1998, of all clothing, except for the under clothes, in the condominium, and that he handed those clothing, on 1 March 1998, to PW11. The relevant search list (D26) says nothing about any female clothing. But PW11 testified that PW5 handed him a bundle of unmistakable female clothing.

It ought to be said, lest such an impression is inadvertently conveyed by the discussion of the evidence, that the court is not conducting a maximum evaluation of the evidence. The court is merely spotlighting the opposing versions in the evidence adduced by the prosecution, opposing versions from the same side that rendered it well nigh impossible to make what of the narrative of the prosecution. Was it the narrative that the accused was the sole occupier (on the evidence that the rooms were empty save for the room shown in photograph P7(23), or were there other occupiers (on the evidence of the female clothing, and the clothing in the locked room)? Was it the narrative that the security post had the keys of the accused to the condominium, or was it that a new lock was installed after 7am on 3 January 1998? Which version is accurate? Sadly, all that, which ought to be settled, was not settled in the narrative of the prosecution.

There is no settled narrative, and there is, consequently, no *prima facie* case. For contrary versions cannot be advanced, notwithstanding that the standard of proof at the stage of the close of the prosecution case is *prima facie* evidence. There is no sufficient credible *prima facie* evidence upon which the court can proceed to find the accused guilty even if he should remain silent. The only evidence of control, of care, or of guardianship of the drugs concealed in the condominium is by inference of the tenancy of the accused. But in a capital offence, evidence by inference alone is not enough to support a conviction without the element of control (*Choo Chang Teik v. PP* [1991] 3 CLJ 2387; [1991] 3 MLJ 423).

For the above reasons, this accused is acquitted and discharged.